# Supreme Court of the United States

**OCTOBER TERM, 1941.**

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**NOS.**

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GLADYS M. WESTPHAL, Widow of F. Gilbert Westphal, SHIRLEY JUNE WESTPHAL, JANICE BETH WESTPHAL, and ELLEN MAE WESTPHAL, Minors, Children of Gladys M. Westphal and F. Gilbert Westphal, by GLADYS M. WESTPHAL, Their Guardian ad Litem,

*Petitioners,*

*vs.*

KANSAS CITY LIFE INSURANCE COMPANY, Kansas City, Missouri, a Corporation.

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GLADYS M. WESTPHAL, Widow of F. Gilbert Westphal,

*Petitioner,*

*vs.*

KANSAS CITY LIFE INSURANCE COMPANY, Kansas City, Missouri, a Corporation.

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## BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

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### Opinions of the Courts Below.

The opinion of the District Court, filed February 27, 1941, appears at R. 229-239, and is reported in 37 F. Supp. 300-306. The opinion of the Circuit Court of Appeals, Judge Evans dissenting, filed February 5, 1942, appears at R. 279-287, and is reported in 126 F. (2d) 76-80.

## Grounds of Jurisdiction.

The grounds of jurisdiction appear in the petition, which statement is here adopted as part of this brief.

## Statement of the Case.

The summary statement in the petition of the matters involved outlines the action taken by the District Court and by the Circuit Court of Appeals. A discussion of facts appears in the argument later herein, *infra* 15 to 26.

## Specification of Errors to Be Urged.

The United States Circuit Court of Appeals for the Seventh Circuit erred:

1. In reversing the Judgment of the District Court of the United States for the Eastern District of Wisconsin.

2. In failing to follow the rules of the common law as required by the Seventh Amendment in reviewing the action of the District Court under new Rule 50 (b), Federal Rules of Civil Procedure.

3. In not taking the view of the evidence and the inferences to be drawn therefrom most favorable to petitioners, and not holding there was substantial evidence which the jury might have accepted as adequate to support the conclusion reached in their verdict.

4. In refusing to apply the ordinary formulæ concerning the province of judge and jury and usurping the function of the jury and deciding which of two inferences made from the evidence in this case shall be accepted.

5. In dismissing the appeal of petitioner Gladys M. Westphal and failing to disallow the deduction made in the Judgment for alleged indebtedness of the insured from the amount of insurance recovered by the widow.

## ARGUMENT.

### Summary of Argument.

A. The Issue of Fact Presented By the Evidence Was a Question for the Jury, and Such Fact Tried By the Jury, on Respondent's Motion Under New Rule 50 (b) to Set Aside the Verdict, Could not Under the Seventh Amendment Be Otherwise Re-examined Than According to the Rules of the Common Law.

B. The Court of Appeals Under the Common Law and the Seventh Amendment Could not Disregard the Ordinary Formulae Concerning the Province of Judge and Jury and Usurp the Function of the Jury and Decide Under Rule 50 (b) What Inference Was to Be Made From the Evidence. That Was the Province of the Jury As the Fact Finding Tribunal.

C. The District Court Could Not Properly Allow the Deduction in the Judgment Made for Alleged Indebtedness of the Insured From the Insurance Recovered By the Widow.

### Point "A".

**A. The issue of fact presented by the evidence was a question for the jury, and such fact tried by the jury, on respondent's motion under new Rule 50 (b) to set aside the verdict, could not under the Seventh Amendment be otherwise re-examined than according to the rules of the common law.**

The following evidence of facts and circumstances and of Mr. Westphal's character, habits, activities, home and family life, make absence without death at the time found

by the jury improbable in his life, and constitutes such substantial evidence as the jury might accept as adequate to support the conclusion reached in their verdict.

The last day Mr. Westphal was seen was November 5, 1931. That day is undisputed (R. 166). He got up at his usual time and prepared, as he ordinarily did, to go to work. He was in his usual manner in leaving home and kissing his wife goodbye, as he usually did. She noticed nothing out of the ordinary in his actions or attitude toward her or the children, or in any other way (R. 37, 38).

He took nothing from his home, not one thing or article of personal use or affection of any kind (R. 51).

He had been very ill during the night before, after he had returned home from downtown that evening with his wife and oldest daughter and after sleeping for a while. He got up, so did his wife to assist him. She wanted to call the doctor. She was afraid of appendicitis. He took soda, they went to sleep again (R. 36, 38). Mr. Lippert, City Manager at respondent's office, knew he was ill on November 5. At 2:30 P. M. on that day he telephoned Mrs. Westphal, stating Mr. Westphal had left a note he was ill. Mr. Lippert wanted to know how he was (R. 42-44).

The weekend before, October 31, Hallowe'en, he and his wife were with friends at a house party at Fond du Lac. They had driven to Chilton where they left the children with her folks, and then on Sunday returned to Chilton, and from there drove back to Milwaukee. There was nothing out of the ordinary about him during those days. He was not dejected or worried (R. 34, 35, 36, 88-89). On November 1 he was given a raise in salary from $150 to $175 a month, which was approved by Mr. Madden, branch manager in Milwaukee, and the home office (R. 136, 141, 98).

Mr. Westphal was the father of four children, one son who died in infancy, and three daughters, as lovely as one could wish for, petitioners herein, aged on November 5, 1931, eight, four, and three years, of whom and his wife he was extremely fond, and to whom he was most devoted and kind. They had a fine home life. He never spoke a cross word, there was no meanness on his part. He spent his spare time at home, he liked to be at home with his wife and children. They would visit their relatives as much as they could. He idolized his children, would talk to them, take them for a ride, and read them bedtime and Bible stories. They were a happy couple and family (R. 28, 30, 84-86, 88-94, 107-115).

Mr. Westphal came of a fine family. On November 5, 1931, and at the time of the trial, his parents were living in Reading, Pennsylvania. His father was a minister and for a number of years had been pastor of Washington Park Presbyterian Church in Milwaukee (R. 114). He had four brothers, one a minister and Director of Adult Education, Presbyterian Board of Christian Education, residing at Philadelphia; one a minister of North Presbyterian Church in Pittsburgh; one a physician and surgeon in the United States Public Health Service at Attica, New York; one an aeronautical engineer for Waco Aircraft Company at Troy, Ohio; and a married sister living in Pittsburgh. He kept contacts and was on friendly terms with all, visited and corresponded with them. They have not seen him or had any tidings from him since November 5, 1931, nor do they know of anyone who has (R. 26, 115-119).

Mr. Westphal had been active in Boy Scout work. He and his wife regularly attended church and Sunday School. He sang in the choir. He earned his money to go to college, he made an excellent record; he sometimes preached where the minister was away. He sang and gave

time for community affairs. Everyone who had ever known him knew he had devoted his time and activities to those things which are good and worthy in life, that he was a good upright citizen, a man of good character and habits, fond of his home and family, and highly regarded by all. Testimony thereof was given by his wife (R. 28, 30); his oldest daughter Shirley (R. 110-111); Professor Batha now Professor of Physics at Carroll College who was then in college and lived in the same barracks of the Student Army Training Corps (R. 94-95); Mr. Hertz now Special Agent for the Bankers Life Insurance Company who was also then in college (R. 96-97); Miss Conrad of Waukesha at whose home he roomed while at college (R. 95-96); Mr. Bloomer, who worked in the Bank at Chilton at the same time (R. 161); Mr. Morrissey of Chilton, Superintendent of Schools there for 36 years (R. 86-88); Dr. Guenther, dentist, (R. 84-86); Mr. Berger now with First Wisconsin Trust Company (R. 88-90) and Mr. Spransy (R. 112-114) then office and business associates; Mrs. Nyberg, high school English teacher (R. 90-92); Miss Stendler, social worker, (R. 92-94); Mr. and Mrs. Arnold, neighbors in the apartment building where they lived (R. 108-109); Mr. Lowum, superintendent of the apartment building (R. 107); and Reverend Lyter, Pastor of Washington Park Presbyterian Church, who knew both Mr. Westphal and his family and his father's family (R. 114-115).

Respondent contends that an inference that Mr. Westphal did not die at the time found by the jury may be drawn from testimony relating to financial irregularities and that he had failed to remit insurance premiums and had left two letters admitting the default.

The amount claimed unremitted was not pleaded as a defense (R. 11-15), no itemized statement or bill of particulars has at any time been presented, and no ac-

tion has at any time been filed in any court to establish the guilt and amount thereof. Mr. Westphal was not the only one who took in premiums. He was out on business, had to make trips, and others took in money (R. 82, 99, 112, 119). Respondent put in testimony on this matter in a disconnected fashion, without an itemized statement to refer to, covering 225 pages of transcript (R. 122). A great many items were referred to. At the conclusion of the testimony no one could tell if the account showed a balance one way or the other. Respondent in the note (R. 122) in preparing the record explains to have set out these 225 pages in narrative form would make difficult any attempt to summarize the results. The jurors were the judges of this testimony. Many items, as shown by a close analysis of the schedule prepared on appeal by respondent, (R. 122-125), are open for dispute and for different inferences, and were issues for the jury (R. 17). The most the schedule shows unremitted is $772.93. Respondent contended the evidence showed $1500. The most ever claimed was about $2400. The amount is not at all clear, is disputed, and is open to reduction. Only 91 daily reports of remittances of Mr. Westphal (R. 264), of which Ex. S-64, R. 197-203, is a sample, were produced at the trial, and it is not known what an examination of the other daily reports and further accounts would show, were the amount of the indebtedness pleaded as an issue and tried on the merits. The issue tried in this lawsuit was but one, and that was,—Did F. Gilbert Westphal die shortly after last seen.

The representatives of Mr. Westphal's estate have at no time been sued on this accounting, nor has a claim therefor been filed against them in any court. Mr. Westphal has at no time been indicted for embezzlement. No warrant was ever asked for him. Respondent, or its representatives, and the bonding company, did not at the time,

and have at no time, asked the police, detectives or sheriffs to locate him and bring him back. Although irregularities were charged, the fact remains, there never was, and there never has been, a move on the part of anyone to prosecute Mr. Westphal (R. 100, 105-107, 111). The jurors could properly consider this evidence to reach their conclusion.

Mr. Beck representing the bonding company was not at all sure and felt there was much left to be explained, and they were very reluctant to pay the claim. There were others who worked in the cashier's cage many times when Mr. Westphal was not there (R. 82, 53, 57). In letters written by Mrs. Westphal to Mr. Beck, offered by respondent, she stated her contentions,—"There may be someone else just as much to blame." (Ex. D, R. 176, 58). "In spite of the letter I believe him innocent" (Ex. F, R. 179, 59). "I still believe there are things we do not know about" (Ex. G, R. 181, 59).

What made it possible to maintain in the branch office, contrary to policy requirements, a system to collect the entire premium or only a part thereof, and then remit only a portion of the amount due, without notice first given to the Home Office by the policyholder and getting a written consent thereto, was not satisfactorily explained (R. 112-113, 119, 130).

Respondent, although charging Mr. Westphal with taking money, offered no testimony to explain the use he or his family made of this money over and above his earnings and family income. Respondent showed no motive for taking money. His income was ample. In 1931 his salary as cashier was $150 a month. In addition his earnings in 1931 writing life insurance averaged $110 a month. Rent from a home in Chilton added $35.00 a month; his wife had income from lands of $50.00 a month. Total family

income was $345 a month. In 1931 living costs comparatively were low. They did not live extravagantly. The rent was $65.00 a month, no maid; Mrs. Westphal sewed clothes for the children and herself; he came home for meals at noon; they did not entertain; they did not live beyond their income, the children were then young. He had a 1929 Essex car. He did not go to gambling places, speculate on the stock market, smoke or drink, except very little socially; they were not buying a home (R. 28, 29, 30, 31, 32, 50, 55, 59, 61, 87, 89, 91, 95, 99, 102, 107, 108, 109, 113, 114, 115, 179).

All his daily reports, of which Ex. S-64, (R. 197, 203), is a sample, had been sent to the Home Office and had been checked and entered in the general cash journal and the policyholders' cash journal and record cards, and checked with other records at the Home Office from day to day (R. 132-133).

Mr. Westphal had positions of financial trust. For over eight years prior to coming to Milwaukee he had worked in the State Bank at Chilton, of which his father-in-law was president. He was promoted to cashier (R. 26-27). The vice-president (R. 101), and another employee (R. 161) who were in the bank at the same time, testified there were no complaints about his work. He was elected by the people of Chilton to the School Board, was made Treasurer, handled about $50,000 a year, nothing irregular. In the winter of 1929-1930 he was placed in charge of the Greenleaf State Bank, with assets of $300,000, on the recommendation of his father-in-law, which position also required the approval of his trustworthiness by the Banking Department of Wisconsin. The cashier testified there were no irregularities (R. 100-101). At Chilton he had also sold insurance, including life insurance for respondent (R. 27). Of the many witnesses who had contact with him at different periods of his life in different ways,

no one knew why he should be involved in unworthiness in handling money or his business affairs (R. 26, 27, 30, 31, 92, 94-97, 110, 114-115).

Significant in connection with any claim for loss, if Mr. Westphal was at fault, is the financial ability by Mrs. Westphal, her family, his father, and a brother to help make such a loss good. They all loved him. He knew this and he had reason to believe they would assist him, if necessary. He had no reason to fear it was necessary to endure absence. Mrs. Westphal at the time owned valuable lands and had over $4,000 cash in the bank (R. 31, 54, 102, 115). He was bonded. Under such conditions any man would know any loss could be repaid, and if at fault and arrested, he would most likely be placed on probation, as is usually done with a family man on first offense. He had many friends. Advertisements were run in the Chicago papers, the newspapers he was in the custom of reading and can be purchased in all important places, telling him to return (R. 52-53, 28, 32, 33, 85, 87, 89, 108, 112, 114).

Mrs. Westphal did not approve of his employment at the Kansas City Office; she did not like the people they employed, wanted him to obtain employment elsewhere, and he did seek a connection at other places (R. 31, 32, 33-34).

The two letters offered by respondent were typewritten, no one saw them typed or mailed (R. 54, 141). The letter to Mrs. Westphal, with the key to the automobile, (Def.'s Ex. F, R. 180, 60-62), was found in the Westphal mailbox near noon on November 6 by her brother-in-law. It did not come as mail (Ex. A, R. 172, 57, 62). Mrs. Westphal testified: "We all, all of my family and all of his family, had doubts at that time about that communication having come from him." Mr. Westphal had never written to her

on a typewritter, that was one thing he did not do (R. 54, 82). Mrs. Westphal did not recognize the signature "Gil" on Def.'s Ex. T, the letter to Mr. Madden, (R. 166, 205, 139), which was postmarked at Milwaukee, November 6, 1931, at 10:00 A. M., and received by Mr. Madden in the mail that day. Both letters are dated November 4, 1931. On that day Mr. Westphal was at the office and came home for the evening in the usual manner. There was nothing different about his bearing or mental attitude. There being no school the next day on account of Teachers' Convention, he took his oldest daughter and wife downtown that evening, they stopped for ice cream, walked up the Avenue, went for a ride. He was in his ordinary way, they had a happy evening together (R. 34, 35, 36, 110). The opinions about the letters and the inferences to be drawn therefrom were questions for the jury.

The first word of a flight by Mr. Westphal originated in respondent's office at a time when there was no occasion for Mr. Westphal to be missing. This was on the afternoon of November 5, 1931, when Mr. Madden of respondent's office telephoned Mrs. Westphal her husband "flew the coop," that she should call her father to come down (R. 44-45, 53, 82, 83). Mrs. Westphal had not been looking for her husband, she did not expect him to be missing. They had arranged he was to come home at noon and take her to a friend's home, but later he had telephoned he was going to Racine, Wisconsin, and could not do this (R. 40). Mrs. Westphal, later in the afternoon of November 5, telephoned to Chilton and asked her father to come, and he and other relatives and friends came to her home that evening. Mr. Madden and Mr. Lippert, branch manager and city manager for respondent, that evening parked their car on the street across from the Westphal apartment and were there for a long time. Mr. Lippert went in

after her father arrived and wanted him to make alleged losses good (R. 46-49, 82-83). The auditor had been there October 22 to 26, everything had been satisfactory but one item (R. 120, 130, 131). The auditors returned after November 7 to make a further audit and no shortage was claimed by the auditors until after that (R. 121, 131, 145). Mr. Madden and Mr. Lippert were the men who promoted drinking parties after insurance meetings at places and clubs during prohibition days, still there was always plenty to drink (R. 83, 113-114), and at one of these parties Mr. Westphal, who was of small physical size and slight stature (R. 27, 55), and could not stand strong drink (R. 31, 83) came under the influence thereof, lost control of himself, and became the victim of the shameful orgy brought out by respondent in cross-examination (R. 75, 76, 83, 113-114). Mr. Lippert had also followed Mr. and Mrs. Westphal to Chilton and appeared there uninvited on Sundays when they were there for the weekend, which was disliked, unwelcome, and peculiar (R. 164).

It is also disputed that Mr. Westphal was last seen about 7:30 P. M. on November 5, 1931, putting his automobile in his garage a block from his home and leaving with a valise in his hand (R. 282, 152-153). The group of people at the Westphal home that evening was looking for him and the automobile, none of them knew Mr. Westphal had been seen leaving with a valise at 7:30 P. M. at the garage. Mr. Madden in the afternoon had telephoned Mrs. Westphal he "flew the coop" and after that she kept in touch with the garage (R. 44-45, 53). The automobile was not in the garage in the evening. Mrs. Westphal's sister and brother-in-law came over to stay all night at the Westphal home, and he put his car in Westphal's stall that evening, and he took a valise out of the garage. When Mr. Westphal's automobile was returned, no one knew that evening (R. 47-51, 163-164).

The keys of the automobile and letter for Mrs. Westphal were not left in their mailbox at the apartment until forenoon of November 6, where they were found by the brother-in-law at noon (R. 54, 57, 62). It does not seem probable that if Mr. Westphal wanted to flee and was seen leaving with a valise at 7:30 P.M., he having been reported by Mr. Madden to Mrs. Westphal that afternoon as having "flown the coop," that he would be loitering around until the next day. The jurors were the judges of this evidence.

Mrs. Westphal and others concerned turned over all papers and endeavored to solve the question (R. 58, 63, 175). She was bewildered. She was told her husband was short in his accounts, she wondered what became of the money. She believed another office connected with the Madden Office was responsible (R. 165-166). She worked with respondent and the bonding company, giving some reliance to their charges, with the hope her husband might be returned to her. She had doubts as to the charges, so did the bonding company (R. 53, 57, 82, Exs. D, F, G; R. 176, 179, 181, 58, 59). She did not know what to believe and what to do. Sometimes it looked all black to her (R. 75). She wanted him back, if he could be had back. She did not want her husband dead. But time goes on, no word comes, no trace is found, and after seven years the law speaks death. What mother does not hope and hope for herself and for her children, and keep on hoping against hope, for the return of a missing father. At one time she asked for a circle of prayer (R. 67). Once she wrote Mr. Westphal's father, which was brought out by respondent on cross-examination (R. 77),—"Every night I snuggle little Janice up to me and just because she is part of him and somehow I want her near to me all night. Poor babies don't know. I make them always kiss me once for daddy and once for myself, and every night

they ask God to send daddy home so mommy won't cry any more." She loved her husband. Mr. Westphal knew that love, he had felt it too.

The issue presented by the evidence in the record in this case under the Wisconsin decisions was a question of fact for the jury, as held by the District Judge and also Circuit Judge Evans in the dissenting opinion. This was a Wisconsin contract. The action was commenced in the State court, and by respondent removed to the Federal Court. Under *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, the Wisconsin law applies.

In Wisconsin a person who has been missing from his home and family and unheard of for seven years is presumed to be dead. *Ewing* v. *Metropolitan Life Ins. Co.,* 191 Wis. 299, 300-301, and cases there cited. There is no presumption as to either life or death at any particular time during the seven years. *Whiteley* v. *Equitable Life Ass. Soc.,* 72 Wis. 170, 176-178; *White* v. *Brotherhood of Locomotive Firemen,* 165 Wis. 418, 422.

Petitioners here did not have to prove death, only the fact of the time or about the time when such death occurred:

> "But by delaying the action and trial until after such expiration of the seven years, such proof of death was dispensed with by such presumption of the fact; and hence the only remaining fact to be established by the evidence was the time, or about the time, when such death occurred." *Whiteley* v. *Equitable Life Ass. Soc.,* 72 Wis. 170, 174.

> "On this record the insured is dead. (Citing case.) He was living on December 30, 1915, and seven years later was dead. Plaintiff, in her effort to fix, within that period, a time of death, has the benefit, given by the law, of the presumption of death, and on this record the established fact of death. If she were called

upon to prove, unaided by the presumption, both the fact and the time of death, her task would be difficult indeed. But, given the fact of death, and that it occurred within a certain period of time, she has the comparatively lighter task of fixing merely the time of death."

"Under the authorities, it was for the jury to say under all the evidence whether the death occurred within the life of the policy and on or about December 30, 1915, as contended by plaintiff." (*Griffin* v. *N. W. Mut. Life Ins. Co.*, 250 Mich. 185, 194-195.

The Supreme Court of Wisconsin has steadfastly held over the period from 1888 to date, 72 Wis. to 216 Wis., and it is still the law, that the question of the time of death during the seven-year period is for the jury, to be determined from the probabilities disclosed by the evidence. See,—*Whiteley* v. *Equitable Life Ass. Soc.*, 72 Wis. 170, 174, 178, 179:

"That such fact need not necessarily be established by direct evidence, but might be established by circumstantial evidence,—by inferences from the facts and circumstances surrounding his disappearance. All this seems to be in accordance with well-settled rules of law."

"In civil actions, courts and juries are frequently called upon to determine facts from mere probabilities disclosed by the evidence;"

"It was simply for the jury to determine, from the facts and circumstances in the case, when such presumed death did occur."

*Wisconsin Trust Co.* v. *Wisconsin Marine and Fire Ins. Co. Bank*, 105 Wis. 464, 468:

"The question when such presumed death occurred is to be determined from all the facts and circumstances in the case."

*White* v. *Brotherhood of Locomotive Firemen*, 165 Wis. 418, 422, 423:

> "In the instant case it is undisputed that White had been unheard of for more than seven years, and the material question is, At what particular time, during the seven years he was unheard of, did he die? This is a question of fact to be determined by the trial court or a jury. *Whiteley* v. *Equitable L. A. Soc.*, 72 Wis. 170."

In the case of *Delaney* v. *Metropolitan Life Ins. Co.*, 216 Wis. 265, 269, the facts and circumstances from which could be made the inference of death on the day of disappearance were the following:

> "In this case the evidence must be such as to warrant the inference that deceased died on the date of his disappearance. Plaintiff relies upon the following circumstances to make a jury question upon this issue: The fact that insured and his wife had always lived together in domestic tranquillity; the fact that he was a steady worker and had a good position; that he had a daily routine; that he had religious affiliations and attended church regularly with his wife; that his daily routine was nearly invariable and included appearance for work at certain definite hours, and the return to his home at the end of his work. Insured was not a wanderer, but a man who spent his leisure hours at home with his wife. There were no quarrels or other crises in his affairs to explain the sudden disappearance. On the morning of the disappearance he prepared for work at the usual hour, kissed his wife, and left at the usual time. From that time the story is a blank. He failed to arrive at work, and he never returned home. He has never since been seen or heard from."

Each case has different facts and circumstances to affect the strength of the inference. This is referred to in the *Delaney case* in considering that no trace of the body was

found in going from home to the place of work, 216 Wis. 265, 270:

> "While this factor might well have been considered by a jury to weaken the inference, we consider that it merely affects the strength of the inference, and does not, as a matter of law, render speculative the conclusion that death occurred on this day."

Circuit Judge Evans in the dissenting opinion states the ~~covert~~ correct rules (R. 286-287, 126 F. (2d) 76, 80):

> "Each case has its separate factual background. The basis of the many decisions which have left the date of death to the jury, is the recognition that mental states, intentions, explanations of suicide, and disappearances, are factual in their nature. The facts bearing on mental states, intentions, suicidal causes, etc., and the inferences which flow from such facts, support juries' verdicts just as legitimately and soundly as physical evidence or the spoken word, the truthfulness of which is contested."
>
> "The last sentence of the letter (set forth in the majority opinion) to the wife, the mother of his children, might well have been accepted by the jury, over all other evidence, as indicative of a final disappearance from his home and family. It was written under such sad and solemn circumstances as to be prognostic and foreboding. From it the jury might have legitimately drawn an inference of contemplated self-destruction of life by the insured."

See, also, *Mutual Life Ins. Co.* v. *Louisville Trust Co.*, 207 Ky. 654, 269 S. W. 1014, 1016:

> "Necessarily this evidence had to be circumstantial. Direct evidence was not required." (Cases cited).
>
> "In determining the time of death, any conditions from which a persumption as to the continuance or destruction of life would arise are proper to be considered, especially where they tend to strengthen

evidence of a character which, considered by itself, would create a reasonable probability of death at a certain time."

"Under the facts proven, Wallwork was presumed to be dead. When he died was a fact to be found by the jury. His letters indicating his intention to commit suicide were themselves some evidence of that intention. He may truly have had no such intention; that was a question for the jury. If, however, he had come to the conclusion that life was not worth living, he was face to face with one of the deadliest perils that can beset an unsuccessful and disheartened man. It is a matter of common knowledge that many suicides leave written statements of their intention to destroy themselves. In the absence of anything to the contrary, the presumption is that these letters correctly stated his intention. Whether they did or not, and whether he committed suicide then or not, were questions for the jury."

*Kansas City Life Ins. Co.* v. *Marshall*, 84 Colo. 71, 268 Pac. 529, 532, 533, is in accord with Wisconsin:

"While the evidence in some respects is conflicting, it was for the jury to determine therefrom whether it might presume that the death of the insured occurred before the expiration of the 7-year period and within the life of the policy."

"Any facts or circumstances relating to the character, habits, condition, affections, and attachments which usually control the conduct of men, and are the motives of their actions, are competent evidence from which may be inferred the death of one absent and unheard from, whatever has been the duration of such absence. And the learned judge says that a ruling excluding such evidence would ignore the motives which prompt human actions, and forbid inquiry into them to explain the conduct of men."

*Bradley* v. *Modern Woodmen of America,* 146 Mo. App. 428, 124 S. W. 69, 75, is in accord with Wisconsin:

> "In determining the question of whether his death occurred prior to said date, the jury should take into consideration his condition in life, character, habits, and domestic relations, the circumstances attending his departure from home, and the fact that none of his friends, relatives, or acquaintances have heard of him since; and unless, in view of those circumstances and others which may appear in evidence, the jury believe from the evidence Mills died prior to February 2, 1901, the verdict should be for defendant."

*Dobelin* v. *Maccabees,* 171 Wis. 54, 58, a 4-3 decision accepted by the majority of the Court of Appeals, does not carry the presumption of death from seven years' absence from home life or family ties. What distinguishes that case was stated by the trial court (R. 235), and also in *Delaney* v. *Metropolitan Life Ins. Co.,* 216 Wis. 265, 271:

> "It was pointed out in that case, however, that the insured was a wanderer 'with but the slightest of home ties, and these were naturally decreasing rather than strengthening as time went on'."

See, also, 17 C. J. 1170, Death, Sec. 9 c.:

> "*Absence from Residence.* To raise a presumption of death from long absence unheard of, it is necessary that the person in question shall have been absent from his place of residence."

Under Wisconsin law petitioners need not prove, in order for the jury to find that Mr. Westphal died at or about the time or shortly after when last seen, that he at that time encountered some specific peril that would account for his death at that time, or that he came within the range of some impending or immediate danger which might reasonably be expected to have destroyed his life.

The law in Wisconsin does not impose such "arbitrary requirements." See, —*Delaney* v. *Metropolitan Life Ins. Co.*, 216 Wis. 265, 270, citing *Fid. Mut. Life Assn.* v. *Mettler*, 185 U. S. 308, 319. Here, however, we have evidence that Mr. Westphal was very ill the night before. His wife feared it was appendicitis. He was also ill on November 5th. (R. 36, 38, 42-44). In addition, he was treating for a social disease, a chronic case, which then required attention (R. 75-76, 82-83, 113-114). For their verdict the jury might well have accepted this evidence of which and the inferences to be drawn therefrom the most favorable view must be taken for petitioners. Mr. Westphal was a man of small physical size and slight stature, height about five feet, eight inches, weight from 129 to 132 pounds (R. 27, 55).

In Wisconsin proof is also not required of diligent search to establish the presumption of death from absence from home and family; it is enough to show absence and lack of tiding for seven years. *Delaney* v. *Metropolitan Life Ins. Co.*, 216 Wis. 265, 268; *Ewing* v. *Metropolitan Life Ins. Co.*, 191 Wis. 299, 301.

It is also the law in Wisconsin that the presumption of death is not rebutted by proof that the absentee was a fugitive from justice. Only proof that he was alive within the period will rebut it. The mere fact that one was a fugitive from justice is insufficient to prove the continued existence of a person who is absent for over seven years. See,—*Ewing* v. *Metropolitan Life Ins. Co.*, 191 Wis. 299, 301, and *Hansen* v. *Central Verein*, 198 Wis. 140, 144. Mr. Westphal was not a fugitive from justice. No warrant had been asked for him (R. 100, 105-106, 111).

Other states hold differently on these matters of specific peril, diligent search, and fugitive from justice. Petitioners under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64,

are entitled to have applied, as was done by the trial judge and pointed out by Circuit Judge Evans dissenting, the favorable law in the Wisconsin decisions.

In the *Delaney Case,* 216 Wis. 265, there was no evidence to show how the insured died. In disappearance cases it cannot be determined to a certainty how death occurred. It was not necessary for the jury to reach their verdict in this case to determine how Mr. Westphal died, although there was evidence which the jurors might have accepted as adequate to find that death took place on November 5, 1931, or shortly after, from being very sick the night before, which his wife feared was appendicitis, and also being sick the next day, or from his chronic illness, or from some untoward occurrence, or from self-destruction, as stated by Circuit Judge Evans (R. 286-287) the jury might have concluded from the letter, Def.'s Ex. F; R. 60-62, 180, offered in evidence by respondent. The inference of death might arise from disappearance under circumstances inconsistent with a continuation of life even though exposure to some particular peril was not shown. *Fid. Mut. Life. Assn.* v. *Mettler,* 185 U. S. 308, 319.

The only issue was the time of death. The facts and circumstances which tended to fix the time of death at all tended to fix it as found by the jury. No one saw Mr. Westphal or found any trace of him after November 5, 1931. There was no response to the advertisements telling him to return. As is said in *Whiteley* v. *Equitable Life Ass. Soc.,* 72 Wis. 170, 175:

> "The record reveals no facts and circumstances as having transpired after that date tending to fix some subsequent time during the seven years as the probable period of his death."

It is not human for a man who loved his wife and three lovely children, who had a dear father and mother, four brothers, a sister, family ties that could help him, on affectionate terms with all, to secrete himself without death from such precious ones and from all that is dearest and worthiest in this life. No such man would stay away from all that for the amount here in dispute. There was no warrant out for him. No such man could endure such absence. Absence and total blankness to all without death as found by the jury seems improbable in his life. He took nothing from his home. It was the province of the jury to draw the inference of fact from all the evidence. Proof as to the time of death,—

> "might be established by circumstantial evidence, —by inferences from the facts and circumstances surrounding his disappearance. All this seems to be in accordance with well-settled rules of law."
>
> "It was simply for the jury to determine, from the facts and circumstances in the case, when such presumed death did occur." *Whiteley* v. *Equitable Life Ass. Soc.*, 72 Wis. 170, 174, 179.

A finding can rest upon a preponderance of probabilities. See, — *Schwartz* v. *Zellmer*, 209 Wis. 583, 587, and cases there referred to.

> "The matter of the 'preponderance of the evidence' is a jury question, and not a law question." *Duncan* v. *Montgomery Ward & Co.*, 108 F. (2d) 848, 851, (CCA 8).

Under the long settled common law rule governing jury trials, stated in *Gunning* v. *Cooley*, 281 U. S. 90, 94, and other authorities there cited, on motion of respondent to direct a verdict under new Rule 50 (b), it was necessary for the Court of Appeals to assume that the evidence for the petitioners "proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them."

> "If the record discloses *substantial* evidence from which reasonable men *might* find the material, controverted issues in favor of the plaintiff, it is improper to direct a verdict for the defendant." *Flynn* v. *Crume,* 101 F. (2d) 661, 662 (CCA 7). (Italics supplied).

In the case at bar, in re-examining the fact tried by the jury, the majority of the Court of Appeals did not mention and gave no consideration to this firm-clad rule of the common law. In *Storck* v. *Northwestern Natl. Cas. Co.,* 115 F. (2d) 889, 890, (CCA 7), the Court states the Wisconsin rule is that in passing on a motion to direct a verdict, the evidence and reasonable inferences to be drawn therefrom must be considered in the light most favorable to the party against whom the motion is directed, citing *Trautmann* v. *Schefft,* 201 Wis. 113. To the same effect are, — *Geffert* v. *Kayser,* 179 Wis. 571, 573; *Engstrum* v. *Sentinel Co.,* 221 Wis. 577, 578.

When this Court adopted Rule 50 (b), to preserve the sanctity of the Seventh Amendment, the above was a rule of the common law to remain inviolate. Congress in providing for the new Federal Rules of Civil Procedure, (Act of June 19, 1934, c. 651, Sec. 2, (48 Stat. 1064), U. S. C., Title 28, Sec. 723c), expressly enacted:

> "*Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate."

And this Court, pursuant to said Act, in its order of June 3, 1935, noted especially for its advisory committee in undertaking the preparation of the new rules for a system, —

> "maintaining inviolate the right of trial by jury in accordance with the Seventh Amendment of the Constitution of the United States and without altering substantive rights."

In considering the sufficiency of evidence the decisions direct the inquiry as to whether there was "*substantial evidence,*" which term has recently been defined by this Court as meaning:—

> "Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See, — *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 229.

This definition is accepted in Wisconsin *verbatim.* See, —*Jasperson* v. *Ind. Comm.*, 231 Wis. 142, 146, citing this case and quoting this definition. It will be noted the word "might" is used, and not "must," and that it is not mandatory on the jury to reach the conclusion from such evidence opposite to that which they might reach, or that conclusion which the respondent contends they should reach.

Here there was substantial evidence from which the jury might have found, and did find, the factual problem in favor of petitioners. The trial judge so held, so did Judge Evans in his dissenting opinion, and when the majority of the Appellate Court was satisfied that "unmistakably, there are two inferences made from the evidence," it found there was substantial evidence from which the jury might have reached its conclusion. The power to decide in the first instance whether there was substantial evidence which the jury might accept as adequate to support their verdict, under the common law and Rule 50 (b) vests in the District Court, which had the better opportunity, the same as the jury, to see and hear the witnesses and to better judge the testimony. The Circuit Court of Appeals cannot disturb the discretion of the District Court, unless there was error as a matter of law. The Court of Appeals cannot become the jury. In *Story Parchment Co.* v. *Peterson Parchment Co.*, 282 U. S. 555, 564, 566, this Court said:

"Juries are allowed to act upon probable and inferential, as well as direct and positive proof."

"But this conclusion rested upon inferences from facts within the exclusive province of the jury, and which could not be drawn by the court contrary to the verdict of the jury without usurping the functions of that fact finding body."

"And the finding of the jury upon that question must be allowed to stand unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts."

See, also, the case of *Bohner* v. *Great Atlantic & Pacific Tea Co.*, 211 Wis. 501, 503:

"If there is credible evidence in the case which sustains the findings of the jury, the court was in error in setting aside the answers to the questions in the special verdict even though the evidence largely preponderated against the findings of the jury. It is not enough that the evidence, contrary to the jury's finding, preponderates or has a greater convincing power; it must make the evidence which tends to sustain the verdict incredible."

In the two courts below, on the record, the trial judge and a Circuit Judge agreed that the jury might draw the conclusion reached from the evidence, and two Circuit Judges agreed there are two inferences made from the evidence. This bears out that fairminded men can honestly reach different conclusions from the evidence. Where uncertainty as to the time of death of a missing person during the seven-year period of absence "arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury." *Gunning* v. *Cooley*, 281 U. S. 90, 94; *Tex. & Pac. Ry. Co.* v. *Harvey*, 228 U. S. 319, 324, 325; *Richmond & Danville Railroad* v. *Powers*, 149 U. S. 43, 45.

It is only where the evidence upon the issue "is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is" that "the court should give a peremptory instruction to the jury." See, — *Gunning* v. *Cooley,* 281 U. S. 90, 94.

**Point "B".**

**B. The Court of Appeals under the common law and the Seventh Amendment could not disregard the ordinary formulae concerning the province of judge and jury and usurp the function of the jury and decide under Rule 50 (b) what inference was to be made from the evidence, that was the province of the jury as the fact finding tribunal.**

When the majority of the Court of Appeals ruled "that the ordinary formulae concerning the province of judge and jury are of little value in a case of this nature," it did so without authority in the law. No authority is cited. It is not in the common law or the Seventh Amendment to the Constitution of the United States, nor can such precedent be invoked under new Rule 50 (b). The sole issue reviewed by the Court of Appeals was the action of the District Court taken on respondent's motion under Rule 50 (b). There is uncertainty as to the power of the Circuit Courts of Appeals under Rule 50 (b), as has been pointed out in *Conway* v. *O'Brien,* 312 U. S. 492; *Berry* v. *U. S.,* 312 U. S. 450; and *Halliday* v. *U. S.,* 86 L. Ed. 393. Rule 50 (b) should not be given a construction permitting the Court of Appeals to invade the province of the jury. Under the Constitution the province of the jury as a fact finding body remains inviolate. There is not one set of rules for determining the province of the judge and jury for one case, and still another set for another case, and still a different set when the factual

problem happens to be the time of death of a missing person during the seven-year period. Recently on the application of Rule 50 (b) to the province of judge and jury, this Court said:

> "Rule 50 (b) goes further than the old practice in that district judges, under certain circumstances, are now expressly declared to have the right (but not the mandatory duty) to enter a judgment contrary to the jury's verdict without granting a new trial. But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact — a jury being the constitutional tribunal provided for trying facts in courts of law. Here, although there was evidence from which a jury could have reached a contrary conclusion, there was testimony from which a jury could have found these to be the facts: * * *" *Berry* v. *U. S.*, 312 U. S. 450, 452-453.

If Rule 50 (b) gives the Court of Appeals power to decide what inference is to be made from the evidence, the rule is in violation of the Seventh Amendment to the Constitution of the United States, and petitioners are deprived of the right of trial by jury, the method of trial guaranteed them by the Constitution on a question of fact. The fact tried by the jury then has not been re-examined according to the rules of the common law.

> "The jurors are the sole judges of the facts and no better method of deciding controverted facts has yet been devised in our system of jurisprudence." *Southern Fruit Distributors, Inc.* v. *Fulmer*, 107 F. (2d) 456, 458, (CCA 4).

This Court has clearly defined the province of judge and jury:

> "The appellate court is not a jury for the trial of a case." *Texas & Pac. R. Co.* v. *Harvey*, 228 U. S. 319, 325.

> "It is to be remembered a jury is a tribunal constituted by law as the court is, its function has as definite sanction as that of the court, and it alone is charged wih the consideration and decision of the facts of a case. And the duty is of such value as to have been considered worthy of constitutional provision and safeguard." *Schaefer* v. *U. S.*, 251 U. S. 466, 476.
>
> "It is as much within the province of the jury to decide questions of fact as of the court to decide questions of law. The jury should take the law as laid down by the court and give it full effect. But its application to the facts, and the facts themselves, it is for them to determine. These are the checks and balances which give to the trial by jury its value. Experience has proved their importance. They are indispensable to the harmony and proper efficacy of the system. Such is the law. (Citing numerous cases)." *Hickman* v. *Jones,* 9 Wall., 76 U. S. 197, 201-202.

Which of two inferences made from the evidence is to be drawn from the evidence is the province of the jury, not the Court of Appeals. It was so stated in *Phoenix Ins. Co.* v. *Doster,* 106 U. S. 30, 32:

> "It is enough to say that the testimony was ample to enable each party to go to the jury upon the substantial issues in the case. The motion, at the close of the plaintiff's evidence, for a peremptory instruction for the company was properly denied. It could not have been allowed, without usurpation, upon the part of the court, of the functions of the jury. Where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved."

The *Delaney Case,* 216 Wis. 265, does not establish the rule that the contentions respondent makes take the case from the jury — it is still a jury question. The most that can be said for respondent's contentions is that they may

affect the strength of the inference as to the time of death as found by the jury, but what inference was to be drawn from the evidence was still for the jury, the fact finding tribunal under the Seventh Amendment of the Constitution. The inferences contended for by respondent to be drawn from the two letters and financial matters are offset by other inferences which may be drawn from the two letters and from any other facts and circumstances in the evidence, and from Mr. Westphal's character, habits, family ties, home life and activities, which all make the time of death as found by the jury most probable. It is for the jury to consider all the facts and circumstances:

> "Conceding that these circumstances justify the inference of consent, (consent to use an automobile), the positive testimony to establish a contrary conclusion cannot destroy the probative force of such circumstances. Such evidence might overcome them, might outweigh them, but it cannot take them out of the case. No matter what evidence is placed on the other side of the scales, this evidence remains, and all of the evidence in the case must be weighed and balanced by the jury."
>
> "A determination of the weight of evidence is a jury function."
>
> "'If there was any evidence warranting submission of the question to the jury, there is enough to support the finding on appeal'."
>
> "The jury had a right to take all of the circumstances into consideration." *Christiansen* v. *Aetna Cas. & Surety Co.,* 204 Wis. 323, 327.

> "The weighing of the evidence is distinctly a function of the jury. While there are many facts, considerations, and circumstances which seem to render improbable a finding that the defendant's conduct was the controlling cause of plaintiff's loss of his wife's affections, nevertheless it plainly was the func-

tion of the jury to weigh all of the facts and circumstances and to come to such a conclusion as they might be persuaded was supported by the weight of the evidence." *Maahs* v. *Schultz,* 207 Wis. 624, 629-630.

The province of the Appellate Court sitting as a court of review for errors of law is not to balance the plaintiffs' evidence against the defendant's evidence, to cast aside the safeguard and inhibitions of the Seventh Amendment, to ignore substantial evidence which the jury might accept as adequate for their verdict, and to usurp the function of the jury and to substitute its discretion for that of the District Court under new Rule 50 (b). The balancing and the effect and weight of the evidence, and what inferences are to be drawn therefrom are for the jury. This is not a question of law.

> "It is easy to accept as legal grounds for dismissal what after all are the somewhat unconscious inferences made from the facts. But the function of making such inferences must be reserved for the jury." *La Guerra* v. *Brasileiro,* 124 F. (2d) 553, 554 (CCA 2).

> "It must be noted that the fact that the court considered the jury's finding against the preponderance of the evidence would not warrant discarding that finding. If there was any credible evidence which reasonably admitted of inferences sufficient to sustain the jury's finding then what were the proper inferences to be drawn was for the jury, and its findings could not be discarded by the court, * * *" *Webster* v. *Krembs,* 230 Wis. 252, 256.

> "If the evidence is conflicting, or if the inferences to be drawn from the credible evidence are doubtful and uncertain, and there is any credible evidence which under any reasonable view will support or admit of an inference either for or against

the claim of contention of any party, then the rule that the proper inference to be drawn therefrom is a question for the jury should be firmly adhered to, and the court should not assume to answer such question upon a motion for direction of verdict, or by substituting another answer after the verdict is returned." *Trautmann* v. *Schefft*, 201 Wis. 113, 115-116.

"'If there is any credible evidence, which under any reasonable view will support or admit of an inference for or against the claim or contention of any party, then what is the proper inference to be drawn therefrom is for the jury and the court should not assume to answer such questions by substituting another answer after the verdict is returned'." *Borg* v. *Downing*, 221 Wis. 463, 465.

"It is the settled law of this state that where there is any credible evidence which, under any reasonable view, will admit of an inference either for or against the plaintiff, then the proper inference to be drawn therefrom is a question for the jury." *Dauplaise* v. *Yellow Taxicab Co.*, 204 Wis. 419, 421.

**Point "C".**

**C. The District Court could not properly allow the deduction in the judgment made for alleged indebtedness of the insured from the insurance recovered by the widow.**

The District Court could not properly make findings of fact and conclusions of law supplemental to verdict (R. 245-247) and allow a deduction of $1500, plus interest, as indebtedness of the insured for unremitted premiums, from the insurance recovered by the petitioner Gladys M. Westphal, the insured's widow (R. 251), where the claim for deduction was not pleaded as an issue, was not raised on the trial, and was not tried on the merits. (See Answer, R. 11-15, and Stipulation of parties, R. 260-261).

The claim was not asserted until after order for judgment, and was then brought up on motion by respondent on behalf of and for the benefit of the Hartford Accident and Indemnity Company, who had bonded Mr. Westphal and made a voluntary settlement with respondent, (R. 244). The findings of the District Court were on issues between parties who were not parties to the action. Petitioners are entitled to a fair trial on the merits on the issues involved before such a deduction could be ordered. The trial court could not assume the issues as undisputed.

The alleged claim of the Hartford Company against Mr. Westphal is not deductible from the widow's insurance under the Wisconsin Statutes and decisions. The widow takes the insurance payable to her, free from the creditors of her husband. The insurance is also exempt from the creditors of the insured. *Wisconsin Statutes*, 1929 and 1939, Sec. 246.09, (formerly Sec. 2347), and 1939, Sec. 272.18 (19). (See Appendix.) See also, *Cannon* v. *Lincoln Natl. Life Ins. Co.*, 208 Wis. 452, 454, 455; *First Wis. Natl. Bank* v. *Roehling*, 224 Wis. 316, 324; *First Wis. Natl. Bank* v. *Strelitz*, 209 Wis. 335, 338, 339; *Allen* v. *Central Wis. Trust Co.*, 143 Wis. 381, 384, 385.

The words used in the policies, under which the trial court made the deduction, "any indebtedness to the company, including loans and interest accumulation," (R. 246), cannot properly be construed to include any and all forms of indebtedness of the insured not arising out of the insurance, but only indebtedness connected with the insurance, such as premium notes, premium extensions, and so on. See *Anson* v. *New York Life Ins. Co.*, (Ill.), 96 N. E. 846-847, and *Union Central Life Ins. Co.* v. *Woods*, (Ind.), 37 N. E. 180, 183.

The deduction having been made by the trial court from the insurance recovered by the widow (R. 251), the correctness thereof was raised by her on a cross-appeal and errors there assigned (R. 257-261), but on account of the view taken by the Court of Appeals, no ruling was made on this question, (R. 280, 282, 288), being subsidiary to recovery by petitioners of judgment herein.

**Conclusion.**

It is therefore respectfully submitted that the errors of the Court of Appeals in reversing the judgment of the District Court, are such as to call for the exercise of the supervisory powers of this Court, and that writs of certiorari be issued to review and finally reverse the decision and judgments herein of the United States Circuit Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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